IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1420 OF 1981

Jain Exports Pvt. Ltd. .. Plaintiffs

Versus

The New Indis Assurance Co. Ltd.

and Anr. .. Defendants

Mr. S.L. Shah i/b Khaitan and Jaykar for the plaintiffs

Mr.U.J.Makhija i/b Mulla and Mulla for the defendants.

CORAM : P.V.KAKADE,J.

DATE : 29TH OCTOBER, 2004

P.C.:

1. The plaintiffs have filed this suit against the defendants for recovery of the amount of Rs.14,01,937.39 with interest on principal amount of Rs.12,26,000/= at the rate of 18% p.a.from the date of filing of the suit till payment or realisation.

2. The suit has been filed by the plaintiffs to recover

the said amount on the basis that the goods imported by the plaintiffs were insured under a Policy issued by the first defendants and whereunder the 1st defendants issued a Cover Note in respect of the said consignment. It is alleged that the suit goods were loaded on a vessel "Chao Fong" for carriage from Taiwan to Calcutta and the said ship sank on or about 10th August 1979 Off Sandhads , Near Calcutta during a storm resulting in a total loss of the consignment.

3. The first defendants have filed written statement, inter alia, contending that the contract of insurance is unenforceable in as much as the same is tainted with unlawful object and is inextricably linked with transaction forbidden by law, that the suit contract is against public policy since it is inextricably linked to a transaction which is in violation of the mandatory requirements of the Imports and Exports Control Act, 1947 and the Import Control Order issued thereunder. It is further contended that the plaintiffs are guilty of breach of warrant contained in the profits insurance clause, which is reproduced in the written statement, since the plaintiffs themselves are not the owners of the requisite Import licenses. It is also seen that one

Asu Traders are holders of the Import licence and the plaintiffs are authorised agent for the said Asu Traders. It is further contended that the plaintiffs are neither importers nor owners of the suit consignment and have no insurable interest in the said consignment and are therefore, not entitled to file a suit. The amount of claim is also denied. The claim is also denied on the footing that since the plaintiffs have not filed a suit against the shipping company to preserve and protect the rights of the 1st Defendants as required under the Policy the Plaintiffs are not entitled to any amount whatsoever. On such other grounds the suit is also sought to be dismissed with costs.

4. The issues were settled on the basis of this pleadings. The issues and my findings thereon are as follows :

ISSUES:	FINDINGS
1. Whether the plaintiffs were the owners of the suit consignment ?	In the negative.

2. Whether the insured goods were totally lost on account of the vessel sinking at sea on 8th August, 1979 as alleged in paragraph 8 of the Plaint? In the negative.

3. Whether the Plaintiffs are entitled to recover the sum of Rs.12,26,000/= or any other sum as alleged in paragraph 12 of the Plaint? In the negative.

4. Whether the contract of insurance is unenforceable as it is tainted with an unlawful object and is inextricably linked with a transaction forbidden by law and against public policy as alleged in paragraph 1 of the Written Statement? In the affirmative

5. Whether the plaintiffs are guilty of breach of warranty and the first defendants are

therefore discharged from liability as alleged in paragraphs 2 and 7 of the written statement?	In the affirmative.
6. Whether the plaintiffs had insurable interest in the goods and are therefore, not entitled to sue the first defendants as alleged in paragraphs 3, 5 and 6 of the written statement?	The plaintiffs had no insurable interest in the goods.
7. To what relief, if any, the plaintiffs are entitled?	As per final order below.

5. At the outset it may be noted that the oral evidence of the plaintiffs was led by P.W.-1 Rajendra Kumar Katial, the authorised representative, who filed affidavit dated 17th November, 2003 in lieu of evidence. If we perused the cross-examiantion of this witness, it

is seen that the admission given by the plaintiffs' witness are sufficient to non suit them. The plaintiffs also filed compilation of documents, which were taken on record. Out of these documents, document at Sr.Nos.1,2, 3, 5, 6, 8, 14, 16 to 18, 20 to 25 and 33 were not admitted or exhibited, the others were marked as Exhibits P2 to P24. The 1st defendant also filed compilation of documents, of which item No.7 of the documents were marked as Exhibits except item no.2 which was also exhibited on behalf of the plaintiffs.

6. As noted earlier the cross examination of plaintiffs' witness alone is sufficient to discard the plaintiffs case and therefore it would be just and proper on my part to refer to the same. In para one of his cross examination Mr. Katial stated thus -

> "The plaintiff was acting as a importer of the consignment on behalf of Asu Traders under the import export policy of the year 1979/80. It is correct that plaintiff has no licence for import. (Witness volunteers that they were acting for concerned parties as authorised

agent)"

In para 2 of his cross examination the witness has stated that "Cover Note was issued after the bill of lading was issued. They filed the claim to the owner of the vessel and insurance company as well as on Calcutta Port Trust and also to the agents of the shipping company in India i.e. M/s. Chougule Brothers. They did not file any suit in Calcutta Court or anywhere against any of the said parties." He has further stated that "The suit claim of Rs.12,26,000/= consists of C&F value, plus 20% licence premium plus 50% profit plus 5% incidental charges." Further in cross examination the plaintiffs' witness stated that "No amount is recovered from the Shipping Company at the foot of the claim. He was aware of the procedure that the shipping company declares general average when the ship sinks but he was not aware of the special average. He further stated that he was not not aware of declaration of general average also. When attention of the witness was invited to profits insurance clause vide Page 9 of defendants' compilation, he has stated that it refers to the fact that it is warranted that the insured is the holder of import licence otherwise the insurance shall not be

valid. However, according to the witness, they were not holder of the import licence but they were holder of the letter of authority of Asu Traders. In para 7 of his cross examination the witness has stated that vide his attention was invited to page 13 of defendants' compilation giving procedure in the event of loss or damage for which under writers may be liable. He has further stated that he was aware of the first paragraph thereof and has now became aware of the same. After going through the said para witness agreed that position that rights of the insurance company are to be protected and he admitted that he did not protect interest of the insurance company by filing suit against the earlier. He has stated that he did not recollect whether the plaintiff company had filed suit against any shipping company or not. When his attention was invited to Institute Cargo clauses at page 16 of defendants' compilation, he stated that he does not agree with the proposition after going through clause 9 that he was required to file suit against the shipping company. According to him, it was act of God which caused loss of consignment. During the further cross-examiantion he stated that Asu Traders were licence holder. The consignment was imported under their licence after

entering into an agreement dated 14th February 1979. He has also admitted that as per the agreement the plaintiffs were acting as an agent for the purpose of import and that the ownership of the consignment was that of Asu Traders but Asu Traders were not joined as a party to the suit.

. With reference to the Marine Police, the witness had admitted that the liability of the insurance company is to succeed and not in any way supersede any claim that the insured should be entitled to make against the carrier or their agents and that insurance would not enure for the benefit of the carriers or other parties. He agreed that the insurance company would be entitled to any amount that the plaintiffs recover from the carriers in respect of such loss and that the claim of the plaintiffs had been reduced to that extent. It was further admitted that the goods covered under the policy were under lien of Punjab & Sind Bank. He also stated that the plaintiffs transferred the title in the said goods to the said bank for the purpose of making a claim against the insurance company. In fact Pubjab & Sind Bank had made a claim against the 1st Defendants. He further stated that neither the import licence was

transferred in favour of the plaintiffs nor the goods were sold to them as actual users. Further he has stated thus -

> "Now my attention is invited to our letter dated 28.1.1980. It is correct that it is mentioned in the said letter by us that neither the import licence was transferred in our favour nor the goods were sold to us as actual users. It is correct that the Asu Traders always remained owner of the goods. Now my attention is invited to the insurance certificate page 17 of the compilation. I do not know on what basis 50% profit was mentioned in the said certificate in value details. The goods were not imported an open general licence but under specific licence. I cannot state that when or to whom the licence premium of 20% was paid as noted in the insurance certificate. I state that the licence was not transferable at that time as it was prohibited by law."

. It is further pertinent to note that some of the agreement dated 14th February 1979 between Asu Traders and the plaintiffs, which have been produced by defendant no.1. Clauses 1 to 4, 6, 9, 10, 12, 15, 17 are relevant which, clearly go to show that the goods were imported by the plaintiffs on behalf of Asu Traders and were ultimately to be sold by them to the actual users and the sales were to be done by Asu Traders to such third parties. Thus the plaintiffs have no insurable interest in the said goods since ownership also vested in and continued to remain with Asu Traders. In the aforesaid circumstances it is clear that the plaintiffs have committed breaches of the terms of the insurance policy, which is exhibited as Exhibit-P3 and copy whereof is annexed as item No.10 of the policy of the plaintiffs compilation pages 10 to 20 and on the reverse of page 10 under the heading "Important" is set out the procedure which is to be followed and also the liability of carriers, bailees or other parties. It clarifies the position as follows:

> "It is the duty of the insured and their agents, in all cases, to take such

> measures as may be reasonable for the purpose of averting or minimising the loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised."

Another important clause is clause No.9 in the Institute Cargo Clauses "F.P.A." which reads thus -

> "It is the duty of the assured and their agents in all cases, to take such measures as may be reasonable for the purpose of adverting or minimising the loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised."

It is further to be noted that the insurance shall not enure to the benefit of the carrier or the bailee. Note must be taken of the fact that the first defendants were entitled to be subrogated to the rights of the insured on making any payment under the claim in view of the

provisions contained in Section 79 of the Marine Insurance Act and this right was required to be preserved, protected and exercised by the Insured as set out in the aforesaid clauses but the plaintiffs failed to do so since they did not file any suit against the shipping company.

7. The learned counsel for the defendants No.1 brought to my notice the unreported Judgment of this Court in Suit No.1834 of 1981, which was between the same parties, who are contesting this suit. In that judgment dated 23.2.2004 similar clauses came up for consideration before the learned Single Judge, and same were considered by the learned Judge while deciding Issue No.4 raised in that suit. The learned Judge held that determination of that issue involved consideration of the expression "preserve and exercise" and for that purpose considered various dictionary meaning of the terms as also several English Judgments and ultimately held that after finding support also in the judgment of Madras High Court in the case of E.I.D. Parry (India) Ltd. vs. Far Eastern Marine Transport Co. Ltd. (1988) Madras Law Journals Reports 144 that since the

plaintiff in that suit had not filed a suit against the ship owner to preserve and protect the rights of the insurance company there was a breach of warranty and that the insured was not entitled to receive any payment under the insurance policy, particularly since the claim against the shipping company would be barred at this stage, since a suit, if any, has to be filed within one year from the accrual of the cause of action under the provision contained in the schedule under the Carriage of Goods by Sea Act. I fully agree with the view taken by the learned single judge in that judgment and which can squarely be made applicable to the issues at hand.

8. This aspect apart, there are also other breaches admittedly committed by the plaintiffs which make the insurance policy as a policy tainted with an illegality. The Profits Insurance Clause in the Policy clearly sets out that the insured was, inter alia, warranted that the insured is the holder of the import licence. On the plaintiffs own admission in the evidence it is clear that the plaintiffs were never the holders of the import licence and despite the same they had given such a warranty clearly showing lack of bonafides and good faith on the part of the plaintiffs. It is also an

admitted position that transfer of such licence was prohibited by law. Since an insurance contract is a contract of utmost good faith, the lack of bonafides on the part of the insured, namely, the plaintiffs herein, clearly make the contract tainted with illegality and thus unenforceable by the plaintiffs who are guilty of wrong statement and wrong warranties given to the insurance company. Therefore, I am of the view that the plaintiffs are not entitled to enforce the claim in the insurance policy on this ground.

9. In this regard it must also be noted that the plaintiffs had no insurable interest in the goods since they were not the actual owners but were merely acting as agents for the licence holders as admitted by the plaintiffs witness. They had no insurable interest in the goods as defined in Section 7 read with Section 2(d) and 2(e) of the Marine Insurance Act. In view of this aspect, since the plaintiffs are not the owners of the goods, they were not entitled to file the present suit in view of the provisions contained in Section 230 of the Indian Contract Act and on this ground also the suit is liable to be dismissed.

10. At this juncture it must be noted that the plaintiffs had not shown anything to prove the quantum of loss, if any, caused to them. Admittedly none of the documents produced by the plaintiffs show the value of the goods since the documents were never admitted in evidence, as document at Sr.Nos. 1,2, 3 and 5 and no evidence was led being alleged loss caused to them. In fact in the evidence the plaintiffs' witness further stated that they were not the owners of the goods as actual users, the witness also did not know on what basis 50% profit was mentioned in the said certificate in value details. He was not in a position to said wen or to whom the licence premium of 20% was made as noted in the insurance certificate and that the licence was not transferable at that time as it was prohibited by law. Not has been taken of the fact that the Punjab and Sind Bank had actually made a claim against the 1st Defendant but did not pursue the same. This is apparent from the letter dated 4th September, 1979, which is on record. Thus the plaintiffs are not even to establish that they had any rights to the goods or that they could make any claim and in any event were debarred from making any claim on account of breach of warranties on account of their failure to preserve and exercise all

rights which the insured may have against the carriers and other parties and also since they had wrongfully induced the insurance company to issue cover note on the warranty that the plaintiffs were holders of the import licence.

. In view of this aspect I have no hesitation to hold that the plaintiffs suit deserves to be dismissed and hence issues are answered accordingly.

11. In the result the suit stands dismissed with no order as to costs.

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